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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-010115 01/22/2019

HON. PAMELA GATES

CLERK OF THE COURT
K. Ballard
Deputy

ROBERT J BARON

ROBERT J BARON
18631 N 19TH AVE
158-288
PHOENIX AZ 85027

v.

HONORHEALTH, et al.

ANDREW S ASHWORTH

DOCKET-CIVIL-CCC

JUDGMENT

Before the court is Defendant Scottsdale Healthcare Hospital's October 19, 2018 Motion for Summary Judgment. Summary judgment is appropriate only if no genuine issues of material fact exist and the moving party is entitled to a judgment as a matter of law. *See* Ariz. R. Civ. P. 56(c); *Orme School v. Reeves*, 166 Ariz. 301, 311 (1990).

Taking all inferences in favor of the non-moving party, the facts are:

- Mr. Baron was employed by HonorHealth on an at-will basis; as such, his employment could be terminated with or without cause, with or without prior notice, and with or without any procedural formality or corrective action. *See* Defendant's Separate Statement of Facts in Support of Motion for Summary Judgment ¶3, citing Exhibit 2 HonorHealth Employee Corrective Action Policy at 2 and Exhibit 1 Mr. Baron's deposition at pp. 27:22-28:14.

- Mr. Baron's employment at HonorHealth involved providing training to individuals, including medical providers on using Electronic Medical Records ("EMR"). The training ensured that doctors, nurses, and medical assistants could properly chart information regarding the care of their patients. *See* Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment at p. 2.

- Doctors and nurses were administered a test after receiving training on EMR and indicia on the front of the test indicated that an employee needed 80% to pass the test. *See* Plaintiff's Statement of Facts in Opposition to Defendant's Motion for Summary Judgment, attaching Exhibit B.

- Mr. Baron was informed that HonorHealth had an internal policy that required providers to take an assessment and meet a certain basic minimum competency before they could provide patient care. *See* Defendant's Separate Statement of Facts in Support of Motion for Summary Judgment, attaching Exhibit 1 Mr. Baron's deposition at p. 30:5-16.

- After his employment began, Mr. Baron reported that HonorHealth Employee Hamilton was not checking employees' tests and did not require HonorHealth employees to achieve an 80% score on their final assessment test. *Id.* at ¶4, citing Exhibit 3 August 21, 2015 correspondence from Mr. Baron to HonorHealth.

- In addition, Mr. Baron reported that HonorHealth Employee Hamilton would write in correct answers for the individuals taking the competency tests. *See id.* at Exhibit 1 Mr. Baron's deposition at p. 31.

- On August 27, 2015, two employees complained to HonorHealth of Mr. Baron's teaching methods. *Id.* at Exhibit 5.

- On August 28, 2015, Mr. Baron was placed on Investigatory Suspension. *Id.* at Exhibit 6.

- On August 31, 2015, Mr. Baron again reported to HonorHealth that its employee was committing "fraud" and failing to comply with HonorHealth's EMR training assessment policies. *Id.* at Exhibit 7.

- Mr. Baron was issued a Final Written Warning on September 8, 2015, stating that Mr. Baron received poor feedback regarding classes taught August 25, 26, and 27, 2015. *Id.* at Exhibit 8.

- Mr. Baron appealed the Final Written Warning and submitted a thirteen-page response on September 13, 2015. In his response, Mr. Baron disputed the content of his Final Written Warning. *Id.* at Exhibit 10.

- The Final Written Warning was affirmed. HonorHealth Employee Chuck Scully wrote that Mr. Baron's poor job performance was not a lack of understanding of the training material; rather, "the reasons for the poor performance are what appear to be an autocratic, arrogant and disconnected personal style." *Id.* at Exhibit 11. Mr. Scully stated that Mr. Baron "is not just unwilling, but is incapable of receiving and productively processing feedback to improve his job performance." *Id.* Mr. Scully recommended Mr. Baron's employment be terminated. *Id.*

- On September 24, 2015, Mr. Baron emailed Lynn Hill, HonorHealth's Senior Director of Human Resources, requesting to speak with "an EEOC official." *Id.* at 12. Mr. Baron was informed HonorHealth did not employ an EEOC official. Ms. Hill invited Mr. Baron to provide information to her or HonorHealth Employee Sarah Orozco. *Id.*

- On October 27, 2015, Mr. Baron sent an email to HonorHealth's CEO and then-President advising them that he may have to file a lawsuit. *Id.* at Exhibit 14.

- In response to Mr. Baron's October 27, 2015 email, HonorHealth recommended that Mr. Baron "review the situation and [his] complaint with [HonorHealth's] legal department." *Id.*

- Mr. Baron's complaint and situation was directed by the legal department to HonorHealth Employee Jan Elezian. *Id.*

- On November 9, 2015, Mr. Baron reported that he filed a complaint with the EEOC. *Id.* at Exhibit 12.

- On November 13, 2015, Mr. Baron met with Jan Elezian, HonorHealth's Associate Vice President and Chief Compliance Officer and Jonathan Wallace, HonorHealth's Associate Vice-President HIPAA Privacy and Data Security Officer. During this setting, Mr. Baron explicitly alleged that HonorHealth was violating HIPAA by allowing trainees to use "other people's login" information to access patient medical records. *Id.* at Exhibit 16 at p. 17. Specifically, he reported that individuals who are unable to receive their EMR login until they participate in training, use the login information of other employees. *Id.* at 18. In response, Mr. Wallace advised Mr. Baron, "when you discover more instances like that, you need to call me immediately

. . . [y]ou need to call, because that's where we have a big concern." *Id.* Mr. Baron was then asked to provide all information he had regarding individuals who were sharing login information alleged by Mr. Baron. *Id.* at 19:4-7 ("[I]f you are training . . . and you hear that . . . just walk out and call me immediately, or send me an email, because that is not tolerated."). Mr. Baron was even given the option of calling the hotline and reporting the information anonymously – even by changing his voice. *Id.* at 19:13-16.

- On December 7, 2015, Mr. Baron again reported the existence of "fraud, patient safety, and HIPAA violations in the training department." *Id.* at Exhibit 17.

- On December 21, 2015, Mr. Baron sent an email to HonorHealth claiming that he would violate HIPAA if he failed to report the HIPAA violations known to him. *Id.* at Exhibit 18.

- On the same day, in response to Mr. Baron's allegation, HonorHealth requested additional information regarding Mr. Baron's "HIPAA violation" allegation that individuals were sharing passwords. Mr. Baron responded that he witnessed, on three separate occasions, medical providers giving helpdesk personnel their password information. Mr. Baron also reiterated his statement on November 13, 2015 that individuals were using login information of other employees before receiving EMR training. *Id.*

- On December 22, 2015, HonorHealth was informed by the EEOC that contrary to Mr. Baron's representations, the EEOC did not have a charge filed by Mr. Baron. *Id.* at Exhibit 19.

- HonorHealth terminated Mr. Baron on December 28, 2015. The Notice of Termination stated that Mr. Baron "had fabricated or knowingly distorted, exaggerated, or minimized a report of wrong doing [sic] or a violation of the Compliance Program, Compliance Standards or laws and regulations." *Id.* at Exhibit 19.

Mr. Baron claims that HonorHealth violated A.R.S. § 23-1501(c) when it fired him "after he reported to HonorHealth in good faith, what he believed to be [HonorHealth's] violations of the law including A.R.S. §§ 13-2310, 36-3805, 36-509, and 36-664." *See* Plaintiff's Second Amended Complaint at ¶2. More specifically, Mr. Baron alleges that under the internal policy of HonorHealth, employees had to "pass a knowledge and task based proficiency test in order to demonstrate to the satisfaction of the trainer, that the physician/nurse had the minimum necessary level of understanding how the EMR worked and how to chart a patient they were treating." *Id.* at ¶21. Mr. Baron claims HonorHealth Employee Hamilton did not fail any physician or nurse

and that she did not even grade the proficiency tests. *Id.* at ¶28. Plaintiff further alleges that he reported the conduct, believing that Hamilton's actions constituted fraud and a threat to patient trust and safety at HonorHealth. *Id.* at ¶30. Mr. Baron also claims that he reported violations of A.R.S. §§ 36-3805, 36-509, and 36-664 and that he was terminated in retaliation for reporting these violations of Arizona law. *Id.* at ¶2.

A.R.S. § 23-1501(c)(3)(ii) provides that an employee has a claim against an employer for termination of employment if the employer has terminated the employment relationship of the employee in retaliation for the employee's disclosure in a reasonable manner that the employee has information or a reasonable belief that the employer or an employee of the employer has violated, is violating, or will violate the Constitution of Arizona or the statutes of this state to either the employer or a representative of the employer who the employee reasonably believes is in a managerial or supervisory position and has the authority to investigate the information provided by the employee and to take action to prevent further violations of the Constitution of Arizona or statutes of this state.

First, the court evaluates Mr. Baron's claim that he was terminated in retaliation for reporting that HonorHealth and its employee violated A.R.S. § 13-2310 (establishing that a person who pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises, or material omissions is guilty of committing the crime of fraudulent schemes or artifices, a class two felony). Arizona law does not require health care employees to receive training on EMR or to pass a proficiency test. Considering all inferences in the light most favorable to Mr. Baron, the facts present no plausible scenario in which Mr. Baron reported conduct that HonorHealth or Ms. Hamilton committed the crime of fraudulent schemes and artifices.

Next, the court turns to Mr. Baron's report that HonorHealth violated HIPAA. A.R.S. § 12-1501 does not provide protection to employees who report violations of federal law. *See Galati v. Am. West Airlines, Inc.*, 205 Ariz. 294, ¶ 15, 69 P.3d 1011 (App. 2003).

In response to HonorHealth's argument that he did not report a violation of state law, Mr. Baron claimed in his Second Amended Complaint that he reported to HonorHealth its violations of A.R.S. §§ 36-3805, 36-509, and 36-664. *See* Plaintiff's Second Amended Complaint at ¶2. A.R.S. § 36-3805 provides that a health information organization may not disclose an individual's identifiable health information except under certain circumstances. A.R.S. § 36-664 addresses the release of confidential communicable disease related information. A.R.S. § 36-509 provides that a health care entity must keep records and information contained in records confidential and not as public records and that information contained in the records may only be disclosed to certain categories of people.

Assuming, without deciding, that Mr. Baron's report regarding password sharing established a report of state law, the court examines whether HonorHealth has presented a legitimate, non-retaliatory justification for the adverse employment decision. *Czarny v. Hyatt Residential Mktg. Corp.*, No. 1 CA-CV 16-0577, 2018 WL 1190051, at ¶11-13, *2 (Ariz. Ct. App. Mar. 8, 2018)(memorandum decision)(citing *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994)). HonorHealth terminated Mr. Baron on December 28, 2015, stating that Mr. Baron "fabricated or knowingly distorted, exaggerated, or minimized a report of wrong doing [sic] or a violation of the Compliance Program, Compliance Standards or laws and regulations." *Id.* at Exhibit 19. At a minimum, the court finds no issues of fact regarding HonorHealth's explanation that, contrary to Mr. Baron's November 9, 2015 representation, HonorHealth was told on December 22, 2015 that the EEOC did not have a charge filed by Mr. Baron. *Compare* Defendant's Separate Statement of Facts in Support of Motion for Summary Judgment, attaching Exhibit 19 *with* Exhibit 12; *see generally* Defendant's Separate Statement of Facts in Support of Motion for Summary Judgment. The court finds that HonorHealth presented a legitimate, non-retaliatory reason for Mr. Baron's adverse employment decision. Thus, the burden shifts back to Mr. Baron to show that HonorHealth's proffered explanation was pretextual. *Czarny*, 2018 WL 1190051, at ¶11-13, *2 ("We agree with the parties that the framework [laid out by the Supreme Court in *McDonnell Douglas Corp v. Green,* 411 U.S. 792, 802-04 (1973) for retaliation claims brought under Title VII of the Civil Rights Act of 1964] likewise applies to claims under §23-1501.").

"An employee asserting a whistle-blower retaliation claim [is] required to show that retaliation was a substantial (even if not the sole) motivating factor in the termination." *Id.* at ¶17 (citing *Thompson v. Better-Bilt Aluminum Prods. Co.*, 187 Ariz. 121, 127 (App. 1996) and *Pleak v. Entrada Prop. Owners' Ass'n,* 207 Ariz. 418, 422 ¶12 (2004)). Here, the only possible evidence that HonorHealth terminated Mr. Baron's employment in retaliation for his report that new employees and helpdesk workers were being given the login information of other employees is: 1) the timing of Mr. Baron's termination; 2) HonorHealth's admission that sharing login information violated its internal policy;[1] and 3) Mr. Baron's speculative belief that HonorHealth

[1] In support of this argument, Mr. Baron attaches Exhibit B, an inadmissible document that purportedly quotes various sources. Despite the problems with Exhibit B, the record contains sufficient information to support that HonorHealth acknowledged concern regarding Mr. Baron's report that employees were sharing login information and investigated Mr. Baron's allegations. For example, in response to Mr. Baron's report on November 13, 2015, HonorHealth told Mr. Baron, "when you discover more instances like that, you need to call me immediately . . . [y]ou need to call, because that's where we have a big concern." *See* Defendant's Separate Statement of Facts in Support of Motion for Summary Judgment, attaching Exhibit 18. Mr. Baron was then asked to provide all information he had regarding individuals who were sharing login information alleged by Mr. Baron. *Id.* at 19:4-7 ("[I]f you are training . . . and you hear that . . . just walk out

terminated his employment for reporting the violations. Mr. Baron also claims that the Notice of Termination is evidence of HonorHealth's retaliatory intent. The Notice of Termination states that Mr. Baron "fabricated or knowingly distorted, exaggerated or minimized a report of wrong doing [sic] or a violation of the Compliance Program, Compliance Standards or laws and regulations." *See* Plaintiff's Statement of Facts in Opposition to Defendant's Motion for Summary Judgment, attaching Exhibit A.

Mr. Baron's speculative belief, unsupported by evidence, that HonorHealth retaliated against him for reporting that employees were sharing login information is insufficient to overcome HonorHealth's Motion for Summary Judgment. *See Orme School*, 166 Ariz. at 311 ("[W]hen discovery has been completed and the proponent of a claim or defense is unable to produce evidence sufficient to send the claim or defense to the jury, it would effectively abrogate the summary judgment rule to hold that the motion should be denied simply on the speculation that some slight doubt (and few cases have complete certainty), some scintilla of evidence, or some dispute over irrelevant or immaterial facts might blossom into a real controversy in the midst of trial."); *Modular Mining Systems, Inc. v. Jigsaw Tech, Inc.*, 221 Ariz. 515, 520 ¶19 (App. 2009)("Sheer speculation is insufficient . . . to defeat summary judgment.")(citation omitted); *Tempesta v. Motorola, Inc.*, 92 F. Supp. 2d 973, 982-83 (D. Ariz. 1999)(finding that a plaintiff can rebut an employer's explanation for termination as pretextual only "with direct evidence, even if insubstantial, or with indirect evidence if such evidence is 'specific' and 'substantial'")(citation omitted); *Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267, 270 (9th Cir. 1996); *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983)("[P]laintiff's mere assertion that [defendant] had [retaliatory] motivation and intent in failing to promote him were inadequate, without substantial factual evidence, to raise an issue precluding summary judgment.").

No reasonable juror could conclude that it is more likely than not that HonorHealth terminated Mr. Baron's employment in retaliation for supposedly reporting violations of state privacy laws. Nor could a reasonable juror conclude that retaliation was a substantial factor in the decision to terminate Mr. Baron's employment. *See Taylor v. Graham County Chamber of Commerce*, 201 Ariz. 184, 194 ¶37 (2001)(finding that the law places the burden squarely on the employee to prove his or her employment relationship is not severable at-will because it falls within one of the statutorily limited circumstances).

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and call me immediately, or send me an email, because that is not tolerated."). Mr. Baron was even given the option of calling the hotline and reporting the information anonymously – using a fake voice. *Id.* at 19:13-16. Moreover, Mr. Baron submitted evidence that HonorHealth investigated his allegations regarding user login information prior to and following his termination. *See* Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment at Exhibits D & E.

In this case, HonorHealth met its burden of showing that Mr. Baron does not have sufficient evidence that he made a report of what he reasonably believed was a violation of Arizona law and that his employment was terminated as a result of making the report. Therefore,

IT IS ORDERED granting HonorHealth's Motion for Summary Judgment.

IT IS FURTHER ORDERED vacating the final trial management conference set for February 26, 2019 and the jury trial set to begin on March 25, 2019.

IT IS FURTHER ORDERED denying Defendant's January 4, 2019 Motion in Limine Re: Unsupported Accusations of Impropriety against Counsel and the Court as moot based on the foregoing.

This minute entry disposes of all outstanding claims and issues in this case. Because no further matters remain pending, the court signs this minute entry as a final judgment entered pursuant to Ariz. R. Civ. P. 54(c).

/ s / PAMELA GATES

JUDGE OF THE SUPERIOR COURT